

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Regarding the  
Implementation of the Suspension of Direct  
Access Pursuant to Assembly Bill 1X and  
Decision 01-09-060.

Rulemaking 02-01-011  
(Filed January 9, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING  
GRANTING MOTION TO STRIKE**

This ruling grants the motion filed on December 6, 2002, by Pacific Gas and Electric Company (PG&E) to strike a portion of the opening brief of the California Municipal Utilities Association (CMUA) in the "Departing Load" phase of this proceeding. PG&E moves to strike the portion of CMUA's Opening Brief on page 13, beginning with the word "Additionally," including the inset quotation taken from PG&E's letter dated October 29, 2002, to presiding Administrative Law Judge (ALJ) Myra Prestidge in Application (A.) 02-01-012. CMUA filed a reply in opposition to PG&E's motion on December 6, 2002. PG&E filed a third-round pleading in response to CMUA on December 23, 2002.

**Parties' Positions**

PG&E seeks to strike a portion of CMUA's Opening Brief, claiming it constitutes extra-record material that was not moved into the evidentiary record as an exhibit in this proceeding, nor was it the subject of any prepared or oral testimony, cross-examination, or brief in this proceeding. PG&E thus argues that CMUA's reliance on extra-record material violates the Commission's procedural rules and practices.

As described in PG&E's reply brief (at p. 24), the letter in question describes a stipulation in which PG&E and the Office of Ratepayer Advocates (ORA ) agreed to define the term "departing customers" for purposes of determining the energy efficiency contract cost responsibility of customers in the area proposed for transfer to Turlock Irrigation District. PG&E argues that this definition is completely irrelevant to the definition of "municipal departing load" for purposes of establishing cost responsibility at issue in this proceeding. PG&E argues that CMUA has taken PG&E's letter out of context and drawn the inaccurate, if not misleading, conclusion that PG&E has agreed that "new load" is outside the scope of this proceeding.

CMUA argues that PG&E fails to show how reference to PG&E's stipulation and filing is a "clear violation of the Commission's procedural rules and practices." CMUA claims that the Commission need not adhere to "a rigid and mechanical set of rules relating to evidence,"<sup>1</sup> particularly in reference to rulemaking proceedings. CMUA cites Rule 64<sup>2</sup> that states: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved."

CMUA argues that even matters that would typically offend the courts, such as the admission of hearsay, are countenanced by the Commission to the

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<sup>1</sup> See, e.g., Motion to Strike at 2 ( "*CMUA could have moved to reopen the evidentiary record, petitioned for judicial notice, or taken some other procedurally appropriate step.*" )

<sup>2</sup> Rules referenced in this ruling pertain to the Commission's Rules of Practice and Procedure.

extent that “*substantial rights of the parties shall be preserved.*”<sup>3</sup> CMUA claims that no “substantial right” is violated by CMUA’s reference to PG&E’s stipulation and filing. CMUA denies that PG&E has been prejudiced, but has availed itself of the opportunity to challenge CMUA’s characterization of the stipulation and filing through its reply brief and the Motion to Strike.

CMUA also takes issue with PG&E’s statement that “the [stipulation and filing] constitutes extra-record material...”<sup>4</sup> Rule 72 provides in pertinent part as follows: “If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and are competent, relevant and material.”

Because PG&E’s stipulation and filing were made after the close of evidentiary hearings and prior to the filing of opening briefs in this proceeding, CMUA contends that its opening brief offered the first opportunity to address PG&E’s stipulation and filing. CMUA argues that it “specifically identified” the document in its opening brief and quoted directly from the document.

CMUA’s also claims that its reference to PG&E’s stipulation and filing was also “competent, relevant and material,” as required by Rule 72. CMUA claims the reference was competent because PG&E, itself, authored and filed the document, not another party. The reference was also relevant and material because it relates to a

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<sup>3</sup> See, e.g., D. 98-06-084 at 3, 4 (“*The hearsay rule generally bars the use of hearsay evidence in a court trial. (See Evidence Code sec. 1200.) However, hearsay evidence is admissible in Commission proceedings. (See Public Utilities Code sec. 1701(a) (‘the technical rules of evidence need not be applied’ in Commission hearings).*”)

<sup>4</sup> Motion to Strike at 1.

key issue in this proceeding, namely, PG&E's understanding and use of the definition of "departing customer,"<sup>5</sup> as such term may involve "New Municipal Customer Load."

PG&E argues that because the stipulation and filing relates to energy efficiency contracts, and not power purchase contracts, it is not relevant in this proceeding.<sup>6</sup> CMUA concedes that because the stipulation and filing relates to energy efficiency contracts, and not power purchase contracts, the probative value (or relative weight) associated with the stipulation and filing may be affected. CMUA disputes, however, that as a result, the stipulation and filing are entirely irrelevant or immaterial.

Rule 73 further states: "Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California." CMUA argues that even though it did not specifically and expressly "petition for judicial notice," the Commission is not constrained from officially noticing the existence of PG&E's stipulation and filing, and allowing reference to be made to the document. Even without a party request, a court has discretion to take judicial notice.<sup>7</sup> Additionally, even if the Commission may not take judicial notice of the truth of the statements contained in the filing, it may nevertheless take notice of the existence of the filing

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<sup>5</sup> See PG&E Reply Brief at 24 and CMUA Opening Brief at 13.

<sup>6</sup> *"The fact that PG&E and ORA stipulated to a definition of 'departing customers' for purposes of determining the energy efficiency contract cost responsibility of customers in the area proposed for transfer to TID has no bearing on the definition of 'municipal departing load' for purposes of this proceeding."* (PG&E Reply Brief at 25.)

<sup>7</sup> See Evidence Code § 453 (Official Comment).

because the filing may have probative value beyond simply the truth of the statements contained in the filing.<sup>8</sup>

CMUA claims that PG&E is not objecting to the truth of the statements contained in the filing, but is merely to the fact that CMUA has not taken procedurally appropriate steps.<sup>9</sup> CMUA claims that PG&E's stipulation and filing has evidentiary value beyond simply the truth of the statements contained in the filing, but also provides evidence of PG&E's practice with respect to defining the term "departing customer."

### **Discussion**

Good cause exists to grant PG&E's motion to strike. While Rule 64 provides that "technical rules of evidence ordinarily need not be applied in hearings before the Commission," that rule applies to the *admissibility* of evidence, but not to the reliance of a party on extra-record evidence in supporting its arguments. CMUA did not seek to introduce the letter in question in hearings, nor did it seek to reopen the record to have the letter entered as a late-filed exhibit. CMUA instead merely relied upon the letter in its opening brief, after the evidentiary record was closed.

CMUA's attempts to justify its use of the material on the basis of the criteria set forth in Rules 72 and 73 are irrelevant in this instance. While Rule 72 provides for materials to be introduced into the record as reference items, that

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<sup>8</sup> See D.02-07-043 at 40.

<sup>9</sup> PG&E's responses have also attempted to show that CMUA has drawn an inaccurate conclusion (see Motion to Strike at 2 and PG&E Reply Brief at 24, 25). However, as mentioned previously, the fact that PG&E has, through its reply brief and the Motion to Strike, fully set forth its characterization of the stipulation and filing removes any possibility of harm or prejudice occasioned by the reference.

rule is not intended as license for a party to rely on such reference items for the first time in a post-hearing brief, as CMUA has done. Thus, the criteria set forth in Rule 73 become relevant where the materials at issue are otherwise properly introduced and parties' fundamental rights are preserved. It is not the policy or practice of this Commission, however, to permit parties to rely on or introduce extra-record material in post-hearing briefs after opportunity to present witnesses and cross-examine have passed. As stated in Decision 88-09-061:

The purpose of a post-hearing brief is to provide the parties with an opportunity to put forth their views of the appropriate interpretation of the evidence presented in the hearing in the light of applicable law. *It is not a forum for producing new evidence, whether or not it is relevant and authentic. Such evidence might be the subject of a motion to reopen or some similar procedural device, if there is good cause why the evidence could not have been produced in a timely manner....As with any other evidence the request that it be recognized should properly be made during a hearing, not afterward. (See, by analogy, California Evidence Code, Sections 452 and 455.) While it is rather meaningless to strike statements in post-hearing briefs, we will grant Pacific's motion to the extent that we will decline to take official notice of these documents and will accord them no weight in this decision.*<sup>10</sup>

The Commission stated in Decision 88-09-061, "it is rather meaningless to strike statements in post-hearing briefs,"<sup>11</sup> since the improperly presented information has already been conveyed to the decisionmakers. In any event, PG&E did take advantage of the opportunity to correct any misrepresentations as to its position on the treatment of "new load" in the context of the referenced materials. PG&E has disagreed with CMUA's characterizations of the PG&E

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<sup>10</sup> D.88-09-061, 1988 Cal. PUC LEXIS 643, at \*4-6, 29 CPUC2d 404 (emphasis added).

<sup>11</sup> D.88-09-061, 1988 Cal. PUC LEXIS 643, at \*6.

position on “new load” in the context of the disputed references contained in the CMUA Opening Brief both on substantive and procedural grounds.

In this instance, it is appropriate to decline to consider the contents of the letter and CMUA’s arguments relying on this information from the letter. Even though PG&E had an opportunity to rebut CMUA’s arguments concerning this letter, any consideration of the information in the letter or the related arguments in the reply brief would violate fundamental principles of fairness as well as condone noncompliance with the Commission’s procedural rules of practice and CMUA’s reliance on evidence not in the record. Accordingly, PG&E’s motion to strike is hereby granted. CMUA’s citation to the letter in question or its arguments based on that letter shall not be considered.

**IT IS RULED** that:

1. Pacific Gas and Electric Company’s motion to strike is granted.
2. California Municipal Utilities Association’s citation to the letter in question or its arguments based on that letter shall not be considered for purposes of deliberations on substantive issues in this phase of the proceeding .

Dated April 18, 2003, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion to Strike on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated April 18, 2003, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.